CORRECTED COPY

Office-Supreme Court, U.S.
FILED
NOV 7 1962
JOHN F. DAVIS, CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1962

No. [redacted] 29

THE MARYLAND COMMITTEE FOR FAIR REPRESENTATION, ET AL., *Appellants*

v.

J. MILLARD TAWES, GOVERNOR, ET AL., *Appellees*

On Appeal from the Court of Appeals of Maryland

BRIEF AMICUS CURIAE OF MONTGOMERY COUNTY, MARYLAND

ALFRED H. CARTER,
County Attorney for Montgomery County

DOUGLAS H. MOORE, JR.
Deputy County Attorney

RICHARD J. SINCOFF
Assistant County Attorney

Attorneys for Montgomery County, Maryland

County Office Building
Rockville, Maryland
POplar 2-2121, Ext. 251

PRESS OF BYRON S. ADAMS, WASHINGTON, D. C.

INDEX

	Page
Interest of Amicus Curiae	1
Argument	3
Conclusion	14

TABLE OF AUTHORITIES

CASES:

Ames v. Board of Supervisors of Elections of Montgomery County, 195 Md. 543, 74 A. 2d 29 (1950)	12
Baker v. Carr, 369 U.S. 186 (1962)	4
City of Hagerstown v. Sehner, 37 Md. 180 (1872)	12
Clauss v. Board of Education, 181 Md. 513, 30 A. 2d 779 (1943)	12
Darling v. City of Baltimore, 51 Md. 1 (1879)	11, 12
Howard County Com'rs. v. Matthews, 146 Md. 553, 127 Atl. 118 (1924)	12
Jewel Tea Co. v. Town of Bel Air, 172 Md. 536, 192 Atl. 417 (1937)	12
Joseph R. Foard Co. v. State, use of Goralski, 219 Fed. 827 (1914)	12
Md. Comm. for Fair Representation v. Tawes, 228 Md. 412, 180 A. 2d 656 (1962)	4
Md. Comm. for Fair Representation v. Tawes, The Daily Record, Oct. 16, 1962, p. 2	3, 4
Mayor & City Council of Baltimore v. Baltimore Gas & Elec. Co., 221 Md. 94, 156 A. 2d 447 (1960)	12
Neuenschwander v. Washington Suburban Sanitary Comm., 187 Md. 67, 48 A. 2d 593 (1946)	12
Pumphrey v. City of Baltimore, 47 Md. 145 (1877)	12
Rushe v. Town of Hyattsville, 116 Md. 122, 81 Atl. 278 (1911)	12
Talbot County Com'rs. v. Queen Anne's County Com'rs., 50 Md. 245 (1879)	12
Town Com'rs of Centreville v. County Com'rs of Queen Anne's County, 199 Md. 652, 87 A. 2d 599 (1952)	11
Williams v. Mayor & City Council of Baltimore, 289 U.S. 36 (1933)	12

STATUTES:	Page
U.S. Const.	
14th Amend.	7, 11, 12, 14
Md. Constitution	
Art. III	
§ 2	3, 4, 6, 9, 14
§ 5	3, 4
§ 28	5
Art. XI-A	5
§ 2	5
§ 3	5
Laws of Md. 1956, Ch. 99	3
Laws of Md. 1962, 2d Spec. Sess., Ch. 1	6
Ann. Code Md. 1957 (and 1962 Cum. Supp.)	
Art. 25A	5
Art. 40, § 42	2, 6
Art. 56, § 137	5
Art. 89B; §§ 32-34	5
Charter of Mont. Co.	
Art. IV, § 3	1
OTHER:	
U.S. 1960 Census	1, 2
Md. Manual 1961-62	2
Md. Population, Md. Plan'g Dept., April, 1961, State Pub. No. 113	10
Washington Post, City Section, p. 1, Oct. 28, 1962	2
Rule 42(4). Rules of U.S. Supreme Court	1
Report of Comptroller, State of Md., Feb. 15, 1962	2

IN THE

Supreme Court of the United States

OCTOBER TERM, 1962

No.

THE MARYLAND COMMITTEE FOR FAIR REPRESENTATION, ET AL., *Appellants*

v.

J. MILLARD TAWES, GOVERNOR, ET AL., *Appellees*

On Appeal from the Court of Appeals of Maryland

BRIEF AMICUS CURIAE OF MONTGOMERY COUNTY, MARYLAND

INTEREST OF AMICUS CURIAE

This brief is filed pursuant to Rule 42(4) of the Rules of this Court. Montgomery County, Maryland, appeared by brief and by argument as Amicus Curiae in the trial court and by brief in the Court of Appeals of Maryland. Montgomery County is a political subdivision of the State of Maryland, and this brief is submitted by its authorized law officers. Charter of Mont. Co., Art. IV, § 3, Mont. Co. Code 1960.

Of the 23 counties in the state, Montgomery is third in population with 383,000 persons as of July 1, 1962 (1960 Census as modified by Maryland-National Capital Park and Planning Commission) and ranks sixth

in total geographical size at 506 square miles. Md. Manual 1961-62, p. 625. In land area (as opposed to water area) the County ranks fifth with 493 square miles. *Ibid.* When the six geographically largest counties are compared by populations, Montgomery County stands second only to Baltimore County. *Id.* at pp. 625 & 629.

Montgomery County has the highest median family income of any county in the United States and is a highly educated, professionalized community. U. S. Census 1960. (Washington Post, City Section, p. 1, Oct. 28, 1962) Over 11% of the people of Maryland live in Montgomery County; they pay 19% of the total state income tax. Report of Comptroller, State of Maryland, 1960, published Feb. 15, 1962.

The issues presented in the instant case are of vital interest to, and vitally affect, the government and all of the citizens of the County. Montgomery County, as an expanding urban-suburban county making up part of the Washington Metropolitan Area, must have fair and equal representation in the state legislature in order to assert the needs and interests of its people, to meet the great challenges with which it and the State of Maryland are faced, to provide for its citizens the services of government and the improvements in urban, suburban, and agricultural living to which they are entitled.

Efforts for relief within the state have proved futile or at best only temporarily hopeful. See Art. 40, § 42, Ann. Code Md. (1957), as amended (1962 Cum. Supp.) for temporary reapportionment of House of Delegates until 1966. Montgomery County has joined with appellants in their battle for fair representation at all levels in all three branches of the state government.

Now, state legislative and judicial avenues to fair representation have been closed to further passage. It remains to pursue the matter to this Court.

ARGUMENT

The Maryland Court of Appeals Has By Its Decision Below Permanently Approved Representation in the Senate and in the General Assembly of Maryland as a Whole at an Increasing Invidiously Discriminatory Ratio in Violation of the 14th Amendment of the United States Constitution. and This Court is the Only Relief for a Determination of the Question

This case comes before the Court from the decision below, which held, in effect, that if one house of the state legislature is barely apportioned on the basis of population, the other house constitutionally may be apportioned solely geographically without regard to population. *Maryland Committee for Fair Representation* v. *Tawes, The Daily Record*, Oct. 16, 1962, p. 2 (Balto., Md.)

The precise legal framework of this decision is as follows:

Sections 2 and 5 of Article III of the Maryland Constitution were ratified by the electorate of Maryland on November 7, 1956, permanently dividing the membership of the Senate and House of Delegates of Maryland among the twenty-three counties and the City of Baltimore without regard to population and making no provision for future reapportionment of either house on the basis of population.

The amendments were submitted to the electorate with *fourteen pages of miscellaneous changes to the Constitution in one ballot question* "For the Constitutional Amendments" or "Against the Constitutional Amendments". Ch. 99, Laws of Md. 1956.

With this indistinguishable package, the voters unknowingly approved invidiously discriminatory representation in both Houses and fastened, on the majority of the state population, control in a handful of representatives from counties of small population.

Prior to *Baker* v. *Carr*, 369 U.S. 186 (1962), the Maryland Court of Appeals heard argument but did not act in this case on the reapportionment question. After *Baker* v. *Carr, supra*, and reargument, the Court of Appeals reversed and remanded a state circuit court ruling upholding the two sections in question. *Maryland Comm.* v. *Tawes*, 228 Md. 412, 180 A. 2d 656 (1962) Subsequently, Section 5 of Article III of the Maryland Constitution was declared invalid, but the Court of Appeals by a 4 to 3 decision upheld the validity of Section 2 of Article III, permanently fixing the representation in the Senate of Maryland at one senator for each county and six for Baltimore City, without regard to population. *Maryland Comm.* v. *Tawes, The Daily Record, supra.*

The question which appellants and Montgomery County will request this Court to examine is the validity of Section 2 of Article III establishing Senatorial representation in Maryland and the validity of the representation of the General Assembly as a whole in which there is no reasonable relation between the numbers of citizens and representation in the state legislature.

Under this decision of the Maryland Court of Appeals there continues to be legislative discrimination against Montgomery County. Montgomery County is a chartered county—one of only two in the state. It is a creature of the Constitution of Maryland, Md.

Const. Art. XI-A., and its powers are strictly delimited and defined by the General Assembly under authority of the Maryland Constitution. Although the majority opinion of the Court of Appeals, *The Daily Record, supra*, describes local autonomy of Maryland's counties, the reverse is true. Montgomery County operates at the sufferance of the state, its powers and citizens absolutely subject to the ultimate control of the legislature. Article XI-A, Sec. 2 of the Maryland Constitution provides in pertinent part:

> The General Assembly . . . shall by public general law provide a grant of express powers for such County . . . as may hereafter form a charter under the provisions of this Article. Such express powers . . . shall not be enlarged or extended by any charter . . . but such powers may be extended, modified, amended or repealed by the General Assembly.

The County can pass no law in conflict with the public general law of Maryland. Md. Const. Art. XI-A, § 3. By simple majority in each house of the legislature, any of the powers expressly granted to Montgomery County by Art. 25A, Ann. Code Md. (1957) (The Express Powers Act) can be repealed. Md. Const. Art. III, § 28.

The unequal composition of the Senate (and consequently the unequal composition of the Assembly as a whole when viewed realistically) has an immediate impact on the way in which state funds are allocated to the counties. As a typical example, gasoline tax revenues are so divided that the state receives 50%, Baltimore City gets 30%, and the remaining 20% is allocated to the 23 counties. Art. 56, § 137 and Art. 89B §§ 32-34, Ann. Code Md. (1957). Maryland county programs are absolutely dependant on distribution formulas for state funds, education being a foremost example, and

no hope of changing the state laws is forthcoming unless a fair reapportionment of the legislature is effected.

As permanently fixed by Section 2 of Article III of the Maryland Constitution, each of the counties has one state senator. (Baltimore City has six, one for each legislative district.) The 23 counties vary in population from approximately 15,500 to more than 500,000. Prior to 1962, Montgomery County had six delegates to the state House of Delegates, but during a special session of the legislature in May of 1962, under canons of the courts, its representation in the House was increased temporarily to 10. Ch. 1, Laws of Md. 1962, 2d Spec. Sess.; Art. 40, § 42, Ann. Code Md. (1962 Cum. Supp.) It serves no Constitutional purpose to correct the inequities in the House of Delegates without at the same time realigning the representation in the Senate. The absurdity of votes in a slightly representative House being nullified by a grossly malapportioned Senate need be considered only once.

On the basis of the 1960 Census, Montgomery County's population was 340,928 (now estimated at 383,000) of the Maryland state total of 3,100,689, or approximately 11% of the state total. With over one-tenth of the state population, the County has but one twenty-ninth of the vote in the Maryland Senate and but one-fourteenth of the vote in the House of Delegates, as the House was recently reapportioned under court mandate on May 31, 1962. Art. 40, § 42, Ann. Code Md. (1962 Supp.), *supra*.

Even under this temporary lower house reapportionment, which expires automatically on January 1, 1966, unless three-fifths of each house of the General Assembly subsequently approves submission of a referendum to the state electorate, there is purposeful and

systematic discrimination against the citizens of the County which reduces their rightful representation in the state legislature, denies them a full vote in equality with other voters and is a denial of equal protection under the first section of the 14th Amendment of the United States Constitution.

The lone Senator from Montgomery County represents in 1962 more than 24 times as many persons as the Senator from Kent County—and every year the population increase of Montgomery County exceeds the entire present population of Kent County. Despite its already remarkable growth, Montgomery County's projected population reveals that absent overall reapportionment, the legislative discrimination against the County will be all the more discriminatory in 1965, 1970 and beyond. Already in the two years since the 1960 census, Montgomery County has added about 43,000 persons. Since 1960, Montgomery County has added more than double, or approximately double, the entire separate populations of Calvert, Caroline, Garrett, Kent, Queen Anne's, Somerset, Talbot, and Worcester Counties. Yet each of these eight counties enjoys equal senatorial representation with Montgomery. The Maryland-National Capital Park and Planning Commission projects that by 1970 Montgomery County will total more than a half-million people; by 1980, 643,400; and by the year 2000, County residents will number 995,000.

The irrational unreality of apportionment in the General Assembly in the Senate and in the House of Delegates even under the temporary reapportionment exists not merely between those subdivisions of large and small population, but shows its purposelessness in subdivisions of comparative population and characteristics.

Charles and Dorchester Counties, ~~both on the Eastern shore~~, with respective populations of 32,572 and 29,666 have two delegates for the larger population and four for the smaller, at least until January 1, 1966, under temporary house reapportionment.

The table below speaks for itself.

TABLE 1. PRESENT REPRESENTATION IN MARYLAND LEGISLATURE ON BASIS OF 1960, U.S. CENSUS INCLUDING TEMPORARY REAPPORTIONMENT OF HOUSE OF DELEGATES

County	1960 Population	State Representation		No. of Persons Represented By Each	
		Senators	Delegates	Senators	Delegates
Allegany	84,169	1	6	84,169	14,028
Anne Arundel	206,634	1	7	206,634	34,439
Baltimore	492,428	1	13	492,428	82,071
Calvert	15,826	1	2	15,826	7,913
Caroline	19,462	1	2	19,462	9,731
Carroll	52,785	1	4	52,785	13,196
Cecil	48,408	1	3	48,408	16,136
Charles	32,572	1	2	32,572	16,286
Dorchester	29,666	1	4	29,666	7,416
Frederick	71,930	1	6	71,930	11,989
Garrett	20,420	1	3	20,420	6,806
Harford	76,722	1	4	76,722	19,181
Howard	36,152	1	2	36,152	18,076
Kent	15,481	1	2	15,481	7,741
Montgomery	340,928	1	10	340,928	56,821
Prince George's	357,395	1	10	357,395	59,566
Queen Anne's	16,569	1	2	16,569	8,285
St. Mary's	38,915	1	2	38,915	19,458
Somerset	19,623	1	3	19,623	6,541
Talbot	21,578	1	3	21,578	7,193
Washington	91,219	1	6	91,219	15,203
Wicomico	49,050	1	4	49,050	12,263
Worcester	23,733	1	3	23,733	7,911
CITY					
Baltimore	939,024	6	39	156,504	26,084
TOTALS	3,100,689	29	142		
STATE AVERAGE				106,920	25,209

Proportionately, no other political subdivision in the state has experienced the population growth of Montgomery County. By comparison, some of its sister jurisdictions in the state have enjoyed stable populations, far smaller than Montgomery's, but with identical representation. Allegany County with just over 84,000 people, has lost population since the 1950 census, while retaining the same voting authority in the Senate as Montgomery. In fact, until the temporary reapportioning of the House in 1962, Allegany County also had the same number of six delegates as Montgomery, and unless the temporary reapportionment is made permanent, the two counties will continue equal in House representation.

The vast change in the size and character of its population has brought the usually expected problems to Montgomery County: roads, schools, transportation, recreation areas, public services of every kind, housing, zoning, planning, preservation of natural resources, taxes, industrial development. The smaller-populated, largely agricultural counties have these problems in far lesser degree than the populous, complex, larger counties. The so-called smaller counties control the conduct of the General Assembly and will continue to control in the Senate.

The political protectivism forever granted state subdivisions with small populations in the Maryland Senate by reason of Section 2 of Article III, Maryland Constitution, presently will grant equally discriminatory favoritism to Baltimore City.

As outlined in detail in appellants' brief, Baltimore City is on a population basis represented by six state senators. From 1930 to 1950 the population of Baltimore City increased from 804,874 to 949,708. From

1950 to 1960, Baltimore's population *decreased* to 939,024, and such decline is predicted to continue. *Md. Population*, Md. Planning Dept., April, 1961, State Pub. No. 113.

From 1930 to 1950, the population of Montgomery County increased from 49,206 to 164,401. From 1950 to 1960 the County population increased by 176,527 to 340,928. *Md. Population, supra.* As of July 1, 1962, the estimated population is 383,000, increasing at a rate of 20,000 plus persons per year.

The trends are confidently predictable and the rate of increase of Baltimore County with 1960 population of 492,428 and Prince George's County, 357,395, are such that by the year 2000, or sooner, each of these counties, with Montgomery, will exceed Baltimore City in population.[1] Anne Arundel County (206,634) will not be far behind.

Each of these urban counties is presently condemned by the Maryland Constitution and the decision of the Court of Appeals upholding present Senate apportionment to immutable discrimination. Baltimore City with its six senators has, or shortly will have, as great a vested interest in continuing the present representation in the Senate as the less populous counties. The Senate will stand with four senators from the four largest counties with a majority of the state population against the interests of twenty-five senators from the rest of the state.

---

[1] Baltimore County population forecasts are a minimum low of 750,000 and a maximum high of 850,000 by 1980. Office of Planning and Zoning, Baltimore County. Prince George's County population is estimated as 671,995 in 1980 and 1,460,404 in 2000 by the Maryland-National Capital Park and Planning Commission.

Constitutional representation under the 14th Amendment requires that the majority of the Senators speak for the majority of the citizens of the state. In the Senate of Maryland geography alone cannot be enough to satisfy the mandate of the 14th Amendment. There can be no sanctity in the theory of geographic apportionment within the states, since the application of the 14th Amendment is directly to the states. No Constitutional formula is expressed as to how the states shall apportion their legislatures, except as the 14th Amendment dictates equal protection of the laws. As Abraham Lincoln believed—and as certainly we and this Court must also believe—government is of, by, and for the people; it is not for mountains, sand, earth, or sea. Trees, valleys, and rivers are not governed, nor do they govern. The people must be the concern of government, and the greatest number of them must be given a proportionate share in the deliberations of their respresentative legislature. The malapportionment of the General Assembly effectively nullifies the democratic rights of the people of Montgomery County.

The majority opinion of the Maryland Court of Appeals finds that the counties of Maryland "[i]n the diversity of their interests and their local autonomy . . . are quite analogous to the states, in relation to the United States" and proceeds, with the aid of history, to uphold geographical Senate apportionment in Maryland. *The Daily Record, supra.* The court's adoption of the federal analogy is fallacious; counties possess no sovereignty, but are mere convenience creations of the state, for the specific purpose to exercise, within a limited sphere, the powers of the state. *Town Com'rs of Centreville* v. *County Com'rs of Queen Anne's County*, 199 Md. 652, 87 A. 2d 599 (1952); *Darling* v.

City of Baltimore, 51 Md. 1 (1879). The state may limit the powers of a municipal corporation (such as Montgomery County), as it sees fit, *Joseph R. Foard Co.* v. *State, use of Goralski*, 219 Fed. 827 (1914); *Mayor & City Council of Baltimore* v. *Baltimore Gas & Elec. Co.*, 221 Md. 94, 156 A. 2d 447 (1960), and a municipal corporation has no privileges or immunities under the federal constitution which it may invoke in opposition to the will of the state, *Williams* v. *Mayor & City Council of Baltimore*, 289 U.S. 36 (1933). For the nature and powers of a county or municipal subdivision within Maryland, see also *Howard County Com'rs.* v. *Matthews*, 146 Md. 553, 127 Atl. 118 (1924); *Clauss* v. *Board of Education*, 181 Md. 513, 30 A. 2d 779 (1943); *Talbot County Com'rs.* v. *Queen Anne's County Com'rs.* 50 Md. 245 (1879); *Neuenschwander* v. *Washington Suburban Sanitary Comm.*, 187 Md. 67, 48 A. 2d 593 (1946); *Pumphrey* v. *City of Baltimore*, 47 Md. 145 (1877); *City of Hagerstown* v. *Sehner*, 37 Md. 180 (1872); *Jewel Tea Co.* v. *Town of Bel Air*, 172 Md. 536, 192 Atl. 417 (1937); *Rushe* v. *Town of Hyattsville*, 116 Md. 122, 81 Atl. 278 (1911); and *Ames* v. *Board of Supervisors of Elections of Montgomery County*, 195 Md. 543, 74 A. 2d 29 (1950).

The lower court's reliance on an analogy to the federal system is difficult to accept when the real relationship of the political bodies is considered. But even if a fair comparison could be made that the relationship of a county to its state today is not significantly different from the relationship of a state to the country, nevertheless it remains that that factor in no way should be controlling.

The guarantees of the 14th Amendment glare directly toward the state. No amount of nice comparison

or reasoning that Congressional apportionment works for the country and should for the state will reduce the glare that illuminates the inescapable message that the state must provide for its citizens a fair representation in the affairs of that state.

Appellants have made pointed argument with reference to judicial and other authority, and with special reference to conflicting decisions in the lower federal and state courts, to support Montgomery County's position that this Court should take jurisdiction of the instant appeal, and the County will not reiterate appellants' brief, save to say that it is clear that substantial and grave Constitutional issues are involved herein which are of paramount importance to the functioning of democratic state governments, especially that of Maryland.

When viewed as a whole, the General Assembly of Maryland still is malapportioned. The evidence, as borne out by the practical workings of the Assembly, is clear that the Maryland Senate is so grossly malapportioned as to work an obvious invidious discrimination against the people of the urban counties. Unless this Court acts to determine the Constitutionality of representation in the Maryland legislature, there is no possibility that three-fifths of the Senate will approve any further change in either the Senate or the House, nor will the state courts act, since the high court of Maryland has ruled Constitutional the representative formula of the Senate. The composition of the Senate will remain as now fixed without hope of change as populations grow and discrimination intensifies.

The history of Maryland's legislative action—or rather inaction—so indicates. The possibility of fair representation in the Maryland legislature as a whole

exists only if this Court accepts this appeal and acts to define the meaning of the 14th Amendment in the affairs of representative state government.

The likelihood of voluntary action by the General Assembly, where there is required a three-fifths majority to propose a constitutional amendment, to reapportion the Senate is diminishing, not advancing.

Former inaction is forever inaction unless this Court takes jurisdiction of this cause to determine whether or not Section 2 of Art. III of the Maryland Constitution is invalid as a denial of equal protection of the law under the 14th Amendment of the U. S. Constitution. No other relief, legislative or judicial is available.

CONCLUSION

For the reasons discussed above, Montgomery County respectfully urges that this Court take jurisdiction of this appeal and set this case for briefing and argument on the merits.

Respectfully submitted,

ALFRED H. CARTER
County Attorney

DOUGLAS H. MOORE, JR.
Deputy County Attorney

RICHARD J. SINCOFF
Assistant County Attorney

County Office Building
Rockville, Maryland

Attorneys for Montgomery County, Maryland